Petition

NO. 81-1915

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CHARLIE F. THORNTON,
Petitioner,

VERSUS

ATLANTA and WEST POINT RAILROAD COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. DID THE TRIAL COURT ERR IN FAILING TO INSTRUCT THE JURY ON THE FULL TEXT OF 45 U.S.C. §51 WHICH AMONG OTHER THINGS MAKES A RAILROAD LIABLE FOR NEGLIGENCE IN FAILING TO PROVIDE AN EMPLOYEE A SAFE PLACE TO WORK WHERE THE EVIDENCE SHOWED THAT PETITIONER WAS INJURED WHEN HE FELL ON TALL GRASS GROWING ALONGSIDE A TRACK WHILE PULLING A CROSSTIE?

II. DID THE TRIAL COURT ERR IN ALLOWING THE RAILROAD'S ATTORNEY TO PRESENT HEARSAY RACIAL SLURS TO AN ALL WHITE JURY HEARING THE BLACK PETITIONER'S CASE, OVER PETITIONER'S TIMELY OBJECTION?

III. WAS THE BLACK PETITIONER DENIED A FAIR TRIAL WHEN HIS CASE WAS TRIED BEFORE AN ALL WHITE JURY SELECTED FROM A PETIT JURY WHICH DID NOT CONTAIN A FAIR, RANDOM CROSS SECTION OF THE CITIZENS OF THE COMMUNITY?

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IN THE
SUPREME COURT OF THE UNITED STATES

CHARLIE F. THORNTON,
Petitioner,

versus

ATLANTA and WEST POINT RAILROAD COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

OPINIONS DELIVERED IN THE COURTS BELOW

Mr. Thornton, Petitioner, filed a civil action against the Respondent railroad in the United States District Court for the Middle District at Columbus, Georgia. [Vol. I, R. 5]

He alleged that he was an employee of the railroad and alleged a cause of action under the Federal Employers' Liability Act (FELA) for the negligence of the railroad resulting in various injuries and damages, including a ruptured disc.

The case was tried before a jury of twelve white persons. [Vol. I, R. 183] Mr. Thornton is black. Following presentation of the evidence, Judgment was entered for the Respondent railroad. [Vol. I, R. 178]

Mr. Thornton filed a timely motion for new trial [Vol. I, R. 179] contending, among other grounds, that the trial court erred by failing to give Plaintiff's requested charge number one (1), the text of 45 U.S.C. §51, and that the

selection procedure and the resulting composition of the petit jury denied Petitioner a fair trial.

The trial court denied the motion for new trial. [Vol. I, R. 188] Mr. Thornton filed a Motion of Appeal. [Vol. I, R. 218] The Appeal was argued on November 18, 1981. On December 1, 1981, the Court of Appeals for the Eleventh Circuit affirmed the trial court, in per curiam opinion. All pertinent opinions are appended hereto.

JURISDICTION

The date of the Judgment of the United States Court of Appeals for the Eleventh Circuit sought to be reviewed is December 1, 1981. The statutory provision conferring jurisdiction on this court to review the judgment in question by writ of certiorari is 28 U.S.C. 1254(1).

STATUTE INVOLVED

45 U.S.C. §51

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or

insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, effect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter." Apr. 22, 1908, c. 149, §1, 35 Stat. 65; Aug. 11, 1939, c. 685, §1, 53, Stat. 1404.

STATEMENT OF THE CASE

Testimony presented during the trial revealed that, at the time of the injury, Petitioner was pulling a crosstie through high weeds which the railroad had permitted to grow along the tracks. [Vol. II, R. 100] While engaged in this work, Petitioner's feet were in these bushes, and his feet slipped out from under him causing him to fall and be injured. [Vol. II, R. 90, 91]

Petitioner's orthopedist testified that the ruptured disc which he found on examining Petitioner could have been caused by this fall. [Vol. II, R. 140] Petitioner underwent surgery known as a laminectomy for removal of the disc and has suffered a total impairment of 15% permanent disability for all injuries received. [Vol. II, R. 5, 146, 153] The trial court refused to give the jury instruction tendered in writing by Petitioner, to wit: the text of 45 U.S.C. §51, which included the portion of that statute which requires the railroad to furnish employees with a reasonably safe place to work. [Vol. III, R. 138]

During the course of the trial, the trial court permitted the

railroad's attorney to read hearsay, racially prejudicial remarks to the jury over objection by Petitioner's counsel. [Vol. II, R. 169–171]

The petit jury panel called for the case was composed of forty-four (44) jurors, of whom only six (6) were black. [Vol. I, R. 183] Petitioner is black. [Vol. II, R. 171] Only one (1) of the black jurors was listed in that portion of the panel from which the jury was actually struck. The railroad's attorney struck the single black juror in his three peremptory challenges. The statutory basis of jurisdiction in the trial court is 45 U.S.C. §56.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

1. THE COURT OF APPEALS HAS RENDERED A DECISION IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS ON THE SAME MATTER.

The trial court erred in failing to give appellant's first request to charge on the pertinent part of 45 U.S.C. §51 as follows:

"Request to Charge No. 1

> I charge you that the law under which this case is being tried is the Act of Congress known as the Federal Employers' Liability Act. So far as applicable to this case, that Act provides:
>
> 'Every common carrier by railroad while engaging in commerce between any of the several States shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, . . .

> for such injury resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed . . .or other equipment.' " (U.S.C.A., Title 45, Section 51)

This statute makes the railroad liable for damages or injury suffered by an employee when the railroad fails to provide the employee a safe place to work. Evidence adduced at trial showed that the Petitioner, at the time of injury, was working in high weeds which the railroad had permitted to grow up alongside the track. [Vol. II, R. 100] Petitioner's feet were in these bushes when they slipped out from under him causing him to fall and be injured. [Vol. II, R. 90–91]

An orthopedic surgeon who testified on behalf of Petitioner stated that the ruptured disc he found in Petitioner could have been caused when Petitioner's foot slipped while Petitioner was pulling a crosstie into position alongside the track. [Vol. II, R. 140] Appellant underwent a laminectomy for removal of this ruptured disc and suffers a 15% permanent disability as a result thereof. [Vol. II, R. 145, 146, 153]

Petitioner's attorney objected to the trial court's failure to give the requested charge on the aforementioned statute and specifically pointed out to the trial court that the charge was required because of the testimony on bad footing caused by the high weeds along the track. [Vol. III, R. 138] Yet, no re-charge was given on this point.

It is well recognized that the negligence of a railroad may manifest itself in the physical surroundings wherein the employee must work. In the instant case, that negligence

occurred when the appellant was required to pull a crosstie through slippery weeds. [Vol. II, R. 90–91] Recently Judge Lewis R. Morgan wrote:

> "In deciding questions of negligence, the courts have uniformly recognized that a railroad is under a non-delegable duty to provide its employees with a reasonably safe place to work. *Nivens vs. St. Louis S. W. Ry. Co.*, 425 F.2d 114 (5th Cir. 1970); *Fort Worth & D. Ry. vs. Smith*, 206 F.2d 667 (5th Cir. 1953)." *Yawn v. Southern Ry. Co.*, 591 F.2d 312, 315 (5th Cir. 1979)

In the *Yawn* opinion , Judge Morgan set forth the text of Section 1 of the Federal Employers' Liability Act, 45 U.S.C. §51, in the same manner in which Petitioner herein had requested it be charged. Breach of this duty, enunciated by Judge Morgan in *Yawn*, is probably the single most common ground for recovery in an FELA case. 11 Am Jur. Trials §17, p. 438. The duty is not narrowly confined, but extends to *any* form of defect that makes the place to work unsafe. See, 17 Ohio St. L. J. 367 (1956).

Actual notice of the defect is not required. The railroad is under a duty to discover dangers and will be held to have constructive notice of dangers which could have been discovered. *Williams v. Atlantic C. L. R. Co.*, 190 F.2d 744 (5th Cir. 1951)

Moreover, there have been numerous other examples of the liability of the railroad for defective work places. Some of these are set forth in the next few paragraphs.

In Chicago, R. I. & P. R. Co. v. Lint, 217 F.2d 279 (7th Cir. 1954) cattle rushed in an inadequate railroad car gate. In its opinion the court stated firmly:

> "The employer under the Federal Employers' Liability Act is required to furnish his employee a safe place to work and safe appliances. 45 U.S.C.A. Sections 51–60."

Oil and *grease* on the steel platform of a coal dumper was evidence of the railroad's negligence in the work area in *Beatie v. Elgin, J & E. Ry. Co.*, 217 F.2d 863 (7th Cir. 1954). In *Beatie*, the Court noted that it is the duty of the Defendant to use reasonable care to furnish plaintiff with a safe place to work, citing *Bailey v. Central Vermont Ry.*, 319 U.S. 350 at p. 352, 63 S. Ct. 1062, 87 L. Ed. 1444. The *Beatie* court further observed:

> "It is a duty which becomes more imperative as the risk increases. It is a continuing duty from which the carrier is not relieved by the fact that the employee's work at the place in question is fleeting or infrequent."

Petitioner testified that his injury resulted in part from the fact that too few employees were assigned to help him move the crossties. [Vol. II, R. 72] Four employees are usually assigned to move crossties, but only two were provided the day of Petitioner's injury. [Vol. II, R. 80] Witness Jesse Campbell testified that a crew of four men pulling a crosstie would make the procedure safe. [Vol. II, R. 98]

Certainly, all of the above cited authorities make manifest the duty of the carrier to provide and maintain a safe place to work. When there is evidence that the railroad has failed to provide such place, as there was in the instant case, it is the duty of the trial court to charge the jury on this legal requirement which is set forth in 45 U.S.C. §51. Yet, Petitioner's requested instruction of the text of 45 U.S.C. §51 was not given.

The trial court did charge the jury as follows:

> ". . . every common carrier by railroad, while engaging in commerce between any of several states shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce for such injury resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier.
>
> Let me go over that one more time. Every common carrier by railroad while engaging in commerce between any of the several states shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce for such injury resulting in whole or in part from the negligence of any of the officer (sic), agents, or employees of such carrier." [Vol. III, R. 121, 122]

To be sure, the above quoted portion of the charge does cover the first portion of 45 U.S.C. §51 very well. ***But, this charge completely fails to mention the second portion of 45 U.S.C. §51 which makes the railroad liable for injuries resulting from its failure to provide its employees with a safe place to work.*** Specifically, this instruction failed to note that the railroad's liability would also result:

> "by reason of any defect or insufficiency due to its negligence, in its car, engines, appliances, machinery, ***track, roadbed*** . . . or other equipment." 45 U.S.C. §51.

This omission of the portion of 45 U.S.C. §51 which was most pertinent to the facts of the instant case was highly

prejudicial to appellant since the jury had no way of knowing that the railroad could be held liable for the hazards created by tall grass at the site where Petitioner was injured. Indeed by failing to charge the second portion of §51, the trial court led the jury to believe that the negligence of the railroad could only be predicated on the "negligence of any of the officers, agents, or employees of such carrier" *rather than also on the failure of the carrier to provide petitioner with a safe place to work.*

In discussing the requested instructions prior to the presentation of the jury charge, the trial court noted as follows:

> On the Plaintiff's side, request No. 1 is covered by what I will give. . ." [Vol. III, R. 57]

As shown above, what the court gave did *not* encompass the request made by the Petitioner, and this was subsequently pointed out to the trial court, albeit to no avail. [Vol. III., R. 138] Indeed, the trial court refused to give ***any*** of the requests to charge submitted to him by the parties! [Vol. III, R. 54]

In determining whether any error resulted from the refusal to give a tendered instruction, the Court should consider: (1) whether the tendered instruction is a correct statement of the law; (2) whether there is evidence in the record to support the giving of the instruction; and (3) whether the substance of the tendered instruction is covered by other instructions. In the instant case reversible error resulted from the trial court's failure to give the portion of §51 which related to the required provision of a safe place to work to the Petitioner-employee. Section 51 of the FELA would certainly constitute a correct statement of the law. The evidence in the record fully supported the giving of the portion requested in writing by the petitioner. [Sec. II, R. 90,

91, 100, 140] Finally, the substance of the instruction tendered by Petitioner was *not* covered by other instructions because the charge of the court omitted to give the applicable law requiring that a safe place to work be provided. [Sec. Vol. III, R. 121, 122]

In *Terminal r. Ass'n of St. Louis v. Howell*, 165 F.2d 135 (8th Cir. 1948), the appellate court observed that the trial court had set forth *the full text* of 45 U.S.C. §51, just as was requested by Petitioner in the instant case. The Howell court then stated at p. 139:

> "It is the office of the Court's instructions to apprize the jury of the questions involved and the rules of law applicable thereto. One of the primary duties of the court is to expound the law to the jury and this is done by means of instructions."

Commenting upon the full text of §51 the *Howell* court, *supra*, at p. 140 said:

> "The basic law governing this case is that which the court in this instruction (referring to the statute) quoted to the jury. . . ***It would be strange indeed if it could be said to be error to lay down the law in the exact language of the statute upon which the action is based.***" (Emphasis supplied)

Conversely, in the case at bar, it would be strange indeed *to fail to lay down* the law in the exact language of the statute upon which this action is based, especially when specifically requested that the statutory language be charged. For this reason the trial court committed reversible error by failing to give the tendered instruction on the full text

of 45 U.S.C. §51, and the decision below should be reversed.

To be sure, when the area of the Columbus Division of the Middle District of Georgia is comprised of approximately 30% blacks (See, *Lockett v. Board of Education of Muscogee Co. Sch. Dist., Ga.*, 447 F.2d 422 (5th Cir. 1972), a jury which has but six (6) blacks of forty-four (44) potential jurors, or about 13% is suspicious at best.

The all white jury which decided the instant case presented a "significant disparity" in composition, both racial and ethnic, from a fair, random cross section of the community of citizens in the Middle District of Georgia in contravention of the Federal Constitution. Under Georgia Law, it is clear that:

> ". . . it is the difference between the percentage of blacks of the jury . . . list and the percentage in the population as a whole which actually determines whether "significant disparity' exists. See *Turner v. Fouche*, 396 U.S. 346, 360–361, (90 SC 532, 24 L.Ed. 2d 567) (1970) [Cits.]" *Cochran v. State*, 151 Ga. App. 478, 480 (1979).

In the instant case, the "significant disparity" mentioned in *Cochran, supra*, is most evident since the percentage of blacks in the population as a whole is 30%,while the percentage on the jury list in the trial of the instant case was about 13%. On March 19, 1981, *The Columbus Georgia Enquirer* reported at p. B–6 that this same sort of disparity is present in the Northern District of Georgia, as well, and that U.S. District Judge William C. Keady had recently dismissed criminal indictments in 51 cases after ruling that Federal Grand Juries there illegally underrepresented blacks, women and the elderly.

In the recent Fifth Circuit case *Ciudadanos Unidos de San Juan vs. Hildalgo City, etc.*, 622 F.2d 807 (5th Cir., 1980) Judge Goldberg states as follows at p. 809:

> "Almost 800 years ago, the Magna Charta proclaimed 'no free man shall be imprisoned . . . or in any way destroyed, except by the lawful judgment of his peers or [and] by the law of the land.' From this seed planted in the early spring of English legal culture has grown our 'very idea of a jury. . . a body of men composed of the peers or equals of the persons whose rights it is selected or summoned to determine; that is of his neighbors, fellows, associates, persons having the same legal status as that which he holds.' *Strauder v. West Virginia*, 100 U.S. 303, 25 L. Ed. 664 (1879)."

Continuing in *Ciudadanos Unidos, supra*, Judge Goldberg quoted from Justice Black's decision in *Smith v. Texas*, 311 U.S. 128, 61 S. Ct. 164, 165, 85 L.Ed. 84 (1940) as follows:

> "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government."

Under these aforestated precepts, it is undeniable that Petitioner, Charlie F. Thornton, was denied a jury selected from a fair cross section of the community in the Columbus

Division of the Middle District of Georgia.

Moreover, when Respondent's attorney struck off the single black juror who might have served on the jury, he may well have been illegally using his peremptory challenges "to appeal to race prejudice" as noted in *Peters, supra.*

Suffice it to say that the all white jury returned a verdict against the black Petitioner in this FELA case. Such a verdict is highly suspicious given the stringent requirements placed on railroads for the safety of their employees under the FELA. For this reason, too, the decision in the trial court should be reversed.

2. THE COURT OF APPEALS DECISION HEREIN CONFLICTS WITH THE PRIOR DECISIONS OF THIS COURT.

The place to work may be rendered unsafe by reason of trees and shrubbery - just as tall grass rendered the work place unsafe in the instant case. *Shawn v. Atlantic C. L. R. Co.*, 353 U.S. 920, 77 St. Ct. 680, 1 L.Ed. 2d 718 (1957) revg 238 F.2d 525 (4th Cir. 1956).

Hazardous conditions like the weeds and underbrush which caused appellant herein to be injuried are amplified when the Defendant railroad is negligent in failing to provide sufficient help to do the assigned work. See, *Blair v. Baltimore & O. R. Co.*, 323 U.S. 600, 89 L.Ed. 490, 65 S. Ct. 545 (1945).

During the examination of Petitioner's orthopedic surgeon, counsel for the Respondent read statements from Petitioner's clinical records which had been recorded by a psychologist who was not present in court for cross-examination. The psychologist, at the time the statements had been recorded, had been employed by a corporation owned by Petitioner's

orthopedist. [Vol. II, R. 168–172] Petitioner's attorney objected repeatedly to quotation from these documents since they raised matters which were wholly outside the record of the trial. [Vol. II, R. 169–170]

Petitioner's attorney even agreed to withdraw the portions of Petitioner's medical bills which related to treatment by the psychologist. [Vol. II, R. 170] Petitioner's attorney stated that the only claim being made as to the psychological injury was that connected with pain and suffering. [Vol.II, R. 170] The trial court ruled that Respondent's counsel could continue reading the hearsay statements until Petitioner withdrew *all* claims for *any* psychological, mental and emotional injury. [Vol. II, R. 170] again, Petitioner's attorney objected. Vol. II, R. 170)

Among hearsay statements read from these records was the following one attributed to the Black Plaintiff-Petitioner:

> "I don't know why I had to wait out there with all those white folks coming before me." [Vol. II, R. 171]

When the orthopedist was asked whether he was aware of these statements being made and being placed in the records, he responded: "No . . ." [Vol. II, R. 171]

Obviously, the above statements contained a racial slur which was attributed to the Plaintiff-Petitioner and was used by Respondent's counsel to appeal to racial prejudice in the all white jury which was hearing this black Plaintiff's case.

This statement, allegedly recorded by a psychologist, who was not called as a witness by Defendant-Petitioner, had no probative value and bore no rational relationship to the subject of psychological injury upon which the ortho-

pedist was being questioned at the time it was read. Respondent's counsel simply employed the statement to prejudice the all white jury. In *Minneapolis St. P. & S. S, R. Co. v. Moquin*, 283 U.S. 520, 51 S. Ct. 501, 502, 75 L.Ed. 1243 (1931), the Supreme Court of the United States said:

> "In actions under the federal statute (referring to the FELA) no verdict can be permitted to stand which is found to be *in any degree* the result of appeals to passion and prejudice." (Emphasis Supplied)

In *New York Central R. Co. v. Johnson*, 279 U.S. 310, 318, 49 S. Ct. 300, 73 L.Ed. 706 (1929), the same court stated:

> "The public interest requires that the court of its own motion, as its power and duty, protect suitors in their right to a verdict uninfluenced by the appeals of counsel to passion or prejudice." (Emphasis Supplied)

The rules set forth above become imperative in a case such as the one now on appeal because it is obvious that the railroad's attorney used the racially prejudicial remarks to appeal to the passion and prejudice of the all white jury hearing this black Petitioner's case. Moreover, reversal of the decision below is required because the notes ascribed to the psychologist were priviliged communications under Georgia Law.

Georgia Code Ann. §84–3118 reads as follows:

> ". . .the confidential relations and communications between licensed applied pyschologist and client are placed upon the same basis as those provided by law between

> attorney and client, and nothing in this chapter shall be construed to require any such privileged communication to be disclosed. ." (Emphasis Supplied)

Appellant objected to this evidence as being illegal on three bases: (1) it was rank hearsay; (2) it was an unlawful appeal to the passion and racial prejudice of the all white jury hearing the black Petitioner's case; and (3) it was privileged communication between a psychologist and his client. For these reasons, the decision below should be reversed.

Of the forty-four (44) jurors on the petit jury for the trial of this case, only six (6) were black. Of those who could have been possibly selected to sit on this jury, only one (1) was black and this juror was struck off by counsel for appellee during the selection process. [Vol. I, R. 183] Plaintiff-Petitioner was a black man. [Vol. II, R. 171]

In *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 66 S. Ct. 984, 90 L.Ed. 1181 (1946), the court reversed a tort judgment in a diversity case on the ground that daily wage earners had been regularly excluded from petit jury service. In language thereafter often repeated, the Court said:

> "The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community."

In *Peters v. Kiff*, 407 U.S. 493, 92 S.Ct. 2163, 3 L.Ed. 83 (1972), the Court reversed on equal protection grounds a state conviction of a white defendant. The state contended that because the defendant was not himself black he was not harmed by the exclusion. The plurality opinion of Justice Marshall rejected the argument stating (at p. 503, 92 S.Ct.

at p. 2169) that:

> ". . . the exclusion from jury service of a substantial and identifiable class of citizens has a potential impact that is too subtle and too pervasive to admit of confinement to particular issues or particular cases."

In *Peters, supra,* the Court warned (at p. 503, 92 S.Ct. at p. 2169) that:

> "the opportunity to appeal to race prejudice is latent in a vast range of issues, cutting across the entire fabric of our society. . ."

The representative cross-section rule is fundamental component of the constitutional right to an impartial jury found in the Sixth Amendment to the federal constitution. The rule has also been embodied in federal legislation. In 1968 Congress declared, at the outset of the Jury Selection and Service Act (28 U.S.C. §§1861–1869) that:

> "It is the policy of the United States that all litigants in the Federal Courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes."

CONCLUSION

As shown above, the black Petitioner in the case at bar should have been given the benefit of a proper instruction on all the pertinent aspects of 45 U.S.C. §51 as was requested in instruction number one (1) which was tendered in writing and which contained the law pertaining to the requirement for a safe place to work. Moveover, the manner in which the Respondent sought to inject racial prejudice into the trial and the composition of the jury should not be condoned by this Court. For these reasons, Petitioner prays that this writ of certiorari should issue to review the judgment of the Eleventh Circuit Court of Appeals herein.

Respectfully submitted,

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and HARCOURT, SNIPES & KENNON

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CERTIFICATE OF SERVICE

This is to certify that a copy of the Petitioner's writ of Certiorari has been served on counsel for all parties in the within matter by personally handing a copy of the aforementioned to Mr. Harry Dicus and Mr. Barschall Andrews, Buck, Andrews & Dicus, P.O. Box 196, Fifth Floor, Corporate Center, 233 12th Street, Columbus, Georgia, 31901.

This 29th day of March, 1982.

By: _____
Counsel for Petitioner

Appendix

JUDGMENT ON JURY VERDICT

UNITED STATES DISTRICT COURT

FOR THE

MIDDLE DISTRICT OF GEORGIA - COLUMBUS DIVISION

CIVIL ACTION FILE NO. 78–77–COL.

CHARLIE F. THORNTON,

vs.

ATLANTA and WEST POINT RAILROAD COMPANY,

JUDGMENT

This action came on for trial before the Court and a jury, Honorable Wilbur D. Owens, Jr. , United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict, February 26, 1980,

It is Ordered and Adjudged that the Plaintiff take nothing, that the action be dismissed on the merits, and that the defendant, Atlanta and West Point Railroad Company recover of the plaintiff, Charlie F. Thornton its costs of action.

Filed at 1:00 p.m. Feb. 27, 1980

/s/ Jonnie L. Adams
Deputy Clerk, U.S. District Court
Middle District of Georgia

Dated at Columbus, Georgia , this 27th Day of February, 1980.

GIRARD W. HAWKINS
Clerk of Court

By/s/ Jonnie L. Adams
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

CHARLIE F. THORNTON,

Plaintiff,

vs.

ATLANTA & WEST POINT RAILROAD COMPANY,

Defendant.

CIVIL ACTION NO. 78–77–COL

Filed 11:30 a.m.. Mar 12, 1980

ORDER

Plaintiff Thornton's motion for a new trial having been carefully considered is hereby DENIED.

Civil appeals in forma pauperis are not appropriate when an appeal is without possible merit and therefore legally frivolous. Plaintiff's contentions of liability under F.E.L.A. rested upon questions of fact which were submitted to a jury. The jury decided against plaintiff. There is more than sufficient evidence to support the verdict. Plaintiff therefore has little if any hope of revising the jury's verdict upon appeal. An appeal if taken would be legally frivolous. Plaintiff's motion for leave to proceed in forma pauperis is therefore DENIED.

SO ORDERED, this the 12th day of March, 1980.

/s/ Wilbur D. Owens, Jr.
Wilbur D. Owens, Jr.,
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 80-7495

CHARLIE F. THORNTON,
Plaintiff-Appellant,

versus

ATLANTA AND WEST POINT RAILROAD COMPANY,
Defendant-Appellee

Appeal from the United States District Court
for the Middle District of Georgia

(December 1, 1981)

Before VANCE, KRAVITCH, and CLARK, Circuit Judges.

PER CURIAM:

AFFIRMED. See Circuit Rule 25.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

CIVIL ACTION FILE NO: 78-77

CHARLIE F. THORNTON,

Plaintiff

vs.

SEABOARD COASTLINE RAILROAD COMPANY doing business as ATLANTA & WEST POINT RAILROAD COMPANY,

Defendant

DAMAGES
Filed 9:32 a.m. May 26, 1978

COMPLAINT

1.

Plaintiff, Charlie F. Thornton, brings this action against Defendant, Seaboard Coastline Railroad Company doing business as the Atlanta & West Point Railroad Company, who is a non-resident corporation of the State of Georgia, however, said Seaboard Coastline Railroad Company does business within the jurisdictional district of this Court and therefore is subject to the jurisdiction of this Court.

2.

That Plaintiff, Charlie, F. Thornton, is a resident of the State of Georgia and was at all times pertinent hereto and whose address is D-212, Tall Pine Apartments, LaGrange, Georgia 30240.

3.

The United States District Court for the Middle District of Georgia, Columbus Division has jurisdiction under the provisions of the United States Code, Title 45 U.S.C.A., Section 56.

4.

The Defendant, Seaboard Coastline Railroad Company doing business as the Atlanta & West Point Railroad Company, is a Public Utility and Railroad Corporation, having railroad lines, engines and box cars which it operates within the jurisdictional district of this Court and operates tracks at the place where Plaintiff was injured at or near Gabbysville, LaGarange, Georgia.

5.

During all times herein mentioned Defendant Seaboard Coastline Railroad Company doing business as the Atlanta & West Point Railroad Company owned and operated in interstate commerce a railroad which owned and maintained railroad tracks and the road bed located around said tracks at or near Gabbysville, LaGrange, Georgia.

6.

Defendant is subject to the jurisdiction of this Court.

7.

The accident and alleged injuries giving rise to this action arose on the 26th day of November, 1976, in LaGrange, Georgia.

8.

On November 26, 1976, Plaintiff was employed as a track repairman pursuant to his employment with the Defendant Seaboard Coastline Railroad Company doing business as the Atlanta & West Point Railroad Company and was working at or near Gabbysville, LaGrange, Georgia.

9.

On November 26, 1976, while the Plaintiff was in the process of performing his duties as a track repairman in LaGrange, Georgia, Plaintiff was caused to be injured as a result of the negligence of the Defendant Seaboard Coastline Railroad Company doing business as the Atlanta & West Railroad Company, acting by and through their agents, servants and employees in the performance of their duties with the defendant.

10.

On November 26, 1976, the Defendant Seaboard Coastline Railroad Company doing business as the Atlanta & West Point Railroad Company, acting through their agents, servants and employees negligently required Plaintiff to perform work for the Defendant and caused the Plaintiff to be injured in that Plaintiff was required to lift heavy railroad crossties, and the Defendant by and through their agents, servants and employees negligently required the Plaintiff to perform this work which Defendant's agents, servants and employees well knew or reasonably should have known that the same was an unsafe practice and would cause personal injury.

11.

Plaintiff on the aforsaid date and place in furtherance of his employment with the Defendant was required to work

under unsafe and hazardous conditions as a result of the Defendant's negligence in its agents, servants and employees in the furtherance of their employment with the Defendant and as a result of a defect or insufficiency due to Defendant's negligence in its cars, engines, appliances, machinery, track, roadbed, work or other equipment of the Defendant.

12.

Prior to these injuries, Plaintiff was a strong, able bodied man. By reason of these injuries he has been made to lose a considerable amount of wages from his employment and Plaintiff's power and capacity to work and earn money in the future has been permanently impaired, he has suffered great mental and physical pain and has incurred expenses for medicine and medical attendance.

13.

This action is brought under and by virtue of the provisions of the Federal Employers Liability Act, Title 45 U.S.C. A. Section 51, et seq.

14.

Plaintiff claims damages against the Defendant in the sum of Seven Hundred Fifty Thousand ($750,000.00) Dollars for his injuries, for his pain and suffering past, present and future, mental and physical, for loss of earnings to date of trial and for the loss of earning capacity in the future by reason of the permanent injuries herein received, and for expenses of medical treatment.

WHEREFORE, Plaintiff prays that he have judgment against the Defendant in the amount of Seven Hundred Fifty Thousand ($750,000.00) Dollars, together with the costs of this action and a trial by jury.

H. BAXTER HARCOURT and BILLY E. MOORE

/s/ Billy E. Moore
Attorneys for Plaintiff

JUDGMENT ON JURY VERDICT

UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF GEORGIA -
COLUMBUS DIVISION

CIVIL ACTION FILE NO. 78–77–CC

CHARLIE F. THORNTON,

vs.

ATLANTA and WEST POINT RAILROAD COMPANY,

JUDGMENT

This action came on for trial before the Court and a jury, Honorable Wilbur D. Owens, J. , United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict, February 26, 1980,

It is Ordered and Adjudged that the Plaintiff take nothing, that the action be dismissed on the merits, and that the defendant, Atlanta and West Point Railroad Company recover of the plaintiff, Charlie F. Thornton its costs of action.

Filed 1:00 p.m., Feb. 27, 1980

Dated at Columbus, Georgia, this 27th day of February, 1980.
GIRARD W. HAWKINS
Clerk of Court
/s/ Jonnie L. Adams
Jonnie L. Adams
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

CHARLIE FRANK THORNTON,

Plaintiff

vs.

ATLANTA & WEST POINT RAILROAD COMPANY,

CIVIL ACTION NO. 78–77–COL.

MOTION FOR NEW TRIAL
Filed March 6, 1980

Comes now the Plaintiff in the above style case and moves the Court to set aside the verdict of the jury rendered herein on February 26, 1980, and the judgment entered thereon on February 27, 1980, and grant to the Plaintiff a new trial on the following grounds:

1. The verdict is contrary to law;

2. The verdict is contrary to the evidence;

3. The verdict is strongly against the weight of the evidence;

4. The Plaintiff moves for the purpose of preserving all rights to challenge the jury selection procedure and the resulting composition of the petit jury for a new trial on the ground that he was denied a fair trial. In light of the fact that counsel and his agents have not had time to analyze the record necessary to set forth the specific grounds for such a challenge, and only a thorough examination of the jury selection process will show whether and to what extent

substantial violations of the law and constitutions have occurred, the plaintiff requests a sufficient opportunity after the relevant records have been made available to examine them, and thereafter that a hearing be scheduled. In support of this motion, the Plaintiff alleges upon information and belief that the method for jury selection for this Court substantially fails to comply with the law and constitutions in the following respects among others:

(a) It fails to insure that petit juries are selected at random from a fair cross section of the community;

(b) It fails to afford all citizens the opportunity to be considered for service;

(c) It systematically excludes citizens from service as petit jurors on account of race, sex, economic status, age, income, occupation, transiency and education.

(d) It presents a significant disparity in composition, both racial and ethnic, from a fair, random cross section of the community citizens.

5. The Court erred in failing to give the complete Plaintiff's request to charge number one which quotes directly the applicable language of 45 U.S.C. §51 as follows:

> "Every common carrier by railroad while engaging in commerce between any of the several states shall be liable to damages to any person suffering injury while he is employed by such carrier in such commerce, . . . for such injury resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, *or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances,*

machinery, track, roadbed . . . or other equipment."

6. The Court erred in failing to charge the jury as requested in writing and as demanded by the evidence on 45 U.S.C. §54, the Federal Employers' Liability Act, that provides as follows:

> "In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to any of its employees, such employees shall not be held to assume the risk of his employment in any case where such injury resulted, in whole or in part, from the negligence of any of the officers, agents or employees of such carrier; and no employee shall be held to have assumed the risk of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

WHEREFORE, the Plaintiff prays that this Motion for New Trial be granted.

LAW OFFICES OF BILLY E. MOORE
AND H. BAXTER HARCOURT

By: /s/ Billy E. Moore
Attorney for Plaintiff

GEORGIA, MUSCOGEE COUNTY:

Personally appeared before the undersigned attesting officer, duly authorized to administer oaths, H. BAXTER HARCOURT, who after first being duly sworn, deposes and states that the facts contained in the foregoing Petit Jury List for the United States District Court for the Middle District of Georgia February term, 1980 are true and correct; as it relates to the names of the jurors and their race.

/s/ H. Baxter Harcourt
H. Baxter Harcourt

Sworn to and subscribed before me
this 5th day of March, 1980.

/s/ G. William Snipe
Notary Public, Muscogee County, Georgia

PETIT JURY - COLUMBUS DIVISION

FEBRUARY 25, 1980

1.Cynthia B. Gammage	34-Banking	Columbus	White
2.Evelyn Watkins	45-Salesclerk	Columbus	White
3.Terry L. McMurry	26-Clerk	Columbus	White
4.Mildred W. Kirkland	58-Textile	Columbus	White
5.Calvin A. Patterson	24-Warehouse-man	Reynolds	White
6.Jetta Lee S. Burks	67-Mach.Oper.	Columbus	White
7.Maria Thresa S.Pate	25Accounting Clerk	Columbus	White
8.Emery Ewell Griffin	63-Carpenter	Columbus	White
9.Mrs.Ray Wainwright	27-Dental Asst.	Reynolds	White
10Addie Mae Battle Ford	59-Housekeeper	Columbus	
11Billy Carter	42-Mechanic	Coleman	
12.Margaret J. Plott	52-Pension Off.	Columbus	White
13Mattie E. Lockhart	33-Mach. Oper.	Butler	Black
14Joe L. Bone	38-Ind.Engr.	Reynolds	White
15Elizabeth M.Langston	20-Secretary	Columbus	White
16Jonnie F. Nelson	45-Teller	Columbus	White
17Princess G. Wright	47-Housewife	Waverlyhall	White
18Caroline H. Moyer	50-Cash Auditor	Columbus	White
19David J. Frazier	22-Heat&Air	Columbus	White
20Elma L. Smith	32-Maid	Junction	City
21James McTier Stroud	34-Sales	Columbus	White
22Yvonne Irene Hughes	18-EKG Tech.	Columbus	White
23 James G. Lowe	59-Argibusiness	BuenaVista	White
24Marvin J. Sparks	19-Textile	Juniper	Absent
25Richard James Barrett	22-Timber Tech.	BuenaVista	White
26Jacob A. Wynn	57-VPSales	Columbus	
27Paula J. Dowling	22-Claim Ex.	Columbus	White
28Billy P. Moncrief	45-County Exe	Ft. Gaines	White
29Dorothy Hill Menard	37-Date Clerk	Columbus	White
30Betty Ponder Kelly	52-Real Estate	Columbus	White

31Alice Chambers Miller	53-Cashier	Columbus	White
32Edwin L. Sparks, Jr.	30-Plmb Helper	Columbus	Black
33Helga M. Pinkley	39-Housewife	Columbus	White
34Mary Bayer Webber	49-Homemaker	Columbus	White
35Johnnie S. Boone	40-Housewife	Columbus	Black
36Dorothy H. McAuliffe	58-Sales	Columbus	White
37Clarence Gardner	58-Cook	Columbus	Black
38Horace Newman	62-Maint.	WaverlyHall	White
39J.C. Reynolds, Jr.	50-Farmer	Shiloh	White
40Sandra M. Moncrief	38-Head Teller	Columbus	White
41Earnest Knight	33-Welder	Columbus	Black
42Hosie D. Russ	58-Laborer	Columbus	Black
43Fredrick Redmond	20-Construction	Lumpkin	White
44Allen P. Myers	64-Diesel Mech.	Columbus	White
Philip Gibson Kendrick	19-Scenic Designer	Columbus	

CERTIFICATE OF SERVICE

I certify that I have this date served a copy of the foregoing Motion for New Trial upon the Defendant in the within matter by mailing a copy of the same in the United States mail with the required postage stamps affixed and properly addressed to insure delivery to Mr. Harry Dicus, Buck, Andrews & Dicus, Fifth Floor, Corporate, Columbus, Georgia, 31901.

This 6 day of March, 1980.

/s/ Billy E. Moore
Of Counsel for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

CIVIL ACTION NO. 7877–COL

CHARLIE F. THORNTON,

Plaintiff

versus

ATLANTA AND WESTPOINT RAILROAD COMPANY,

Defendant

AFFIDAVIT FOR APPEAL IN FORMA PAUPERIS

Comes now the Plaintiff in the above styled case and personally appears before the undersigned attesting officer, duly authorized to administer oaths, CHARLIE F. THORNTON, who after first being duly sworn, deposes and states that he is unable to pay fees and costs for his appeal in the above styled action or give security therefore. For the following reasons, to wit:

1. That the Plaintiff in this action is unemployed;

2. That the Plaintiff in this action has been unemployed for approximately two years following accident at issue herein;

3. That Plaintiff has no present income, or means of procuring future income.

Plaintiff requests this appeal in FORMA PAUPERIS:

1. The verdict is in contrary to law;

2. The verdict is contrary to the evidence;

3. The verdict is strongly against the weight of the evidence;

4. The verdict is a result bias and prejudice jury. The jury was unconstitutionally impaneled and did not represent a cross section of the community in that, among other things, the panel of jurors from which Plaintiff was required to strike contained only one person of the black race on said panel and that the entire slate of jurors present in court on that date contained only six black members out of 40 present jurors;

5. The Panel of jurors that heard the case was an all white jury and I was black and the Defendant was permitted over objection of my attorney to inject further racial prejudice into the record whenever Defendant's counsel was permitted to cross-examine Doctor J. C. Serrato, Jr., as to allege confidential statements made to my pyschologist;

6. The court erred in failing to charge the jury as to request to charge number 1 which is the direct applicable language of title 45, section 51 of the United States code in said request to charge reads as follows:

> "Every common carrier by railroad while engaging in commerce between any of the several states shall be liable to damages to any person suffering injury while he is employed by such carrier in such commerce, . . . for such injury resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances,

machinery, tracks, roadbed . . . or other equipment."

7. The court erred in failing to charge the jury as requested in writing and as demanded by the evidence on title 45, U.S.C.A. section 54 of the Federal Employers Liability Act which states as follows:

> "In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to any of its employees, such employees shall not be held to assume the risk of his employment in any case where such injury result, in whole or in part, from the negligence of any of the officers, agents or employees of such carriers; and no employee shall be held to have to assume the risk of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

The nature of this action is a claim under title 45, United States Code Annotated known as the Federal Employers Liability Act.

I further depose and state that I believe I am entitled to redress, upon the above stated grounds.

/s/ Charlie F. Thornton
CHARLIE F. THORNTON

Sworn to and subscribed before me this 6 day of March, 1980.
Notary Public, Muscogee County, Georgia.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

CIVIL ACTION NO. 78–77–COL.

CHARLIE FRANK THORNTON,

Plaintiff,

versus

ATLANTA & WEST POINT RAILROAD COMPANY,

Defendant.

ORDER
Filed March 12, 1980

Plaintiff Thornton's motion for a new trial having been carefully considered is hereby DENIED.

Civil appeals in forma pauperis are not appropriate when an appeal is without possible merit and therefore legally frivolous. Plaintiff's contentions of liability under F.E.L.A. rested upon questions of fact which were submitted to a jury. The jury decided against plaintiff. There is more than sufficient evidence to support the verdict. Plaintiff therefor has little if any hope of revising the jury's verdict upon appeal. An appeal if taken would be legally frivolous. Plaintiff's motion for leave to proceed in forma pauperis is therefore DENIED.

SO ORDERED, this the 12th day of March, 1980.

/s/ Wilbur D. Owens, Jr.
WILBUR D. OWENS, JR.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

CIVIL ACTION NO. 78–77–COL.

CHARLIE F. THORNTON

Plaintiff

vs.

ATLANTA AND WEST POINT RAILROAD COMPANY,

Defendant

NOTICE OF APPEAL
Filed July 1, 1980

Notice is hereby given that Charlie F. Thornton, Plaintiff in the above style case, hereby appeals to the United States Court of Appeals For The Fifth Circuit from the final Judgment and order entered on the 26th day of February, 1980, after a trial to a civil jury in which a verdict was returned for the Defendant. This appeal is taken upon several grounds including those raised upon the Plaintiff's Motion For New Trial.

LAW OFFICES OF BILLY E. MOORE
and HARCOURT & SNIPES

/s/ Billy E. Moore
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I do certify that I have this date served counsel for the Defendant in the within matter with a copy of the above and foregoing by depositing a copy of the same in the United States mail with the required postage stamps affixed and properly addressed to insure delivery to Mr. Harry Dicus, Buck, Andrews & Dicus, P.O. Box 196, Columbus, Georgia, 31902.

This 1st day of July, 1980.

/s/ Billy E. Moore
Counsel for Plaintiff

[5]
Mr. Moore:

150 or 200 pound cross ties. We expect the evidence to show this was grossly undermanned, that the bed of the road comes up like that and then goes across and that the cross ties were laying off to the side. And Mr. Thornton was going to be required to drag that cross tie a piece. We expect the evidence to show he did what he was told by the apprentice foreman, Mr. Leon Wilkinson. That they have what they call two man dogs. They look like ice picks. They are funny looking things. We have got a picture that we are going to show you where they've got two man dogs and each man - if you've ever seen an ice pick like they used to use when they used to put ice in an old refrigerator when the ice man used to come around and pick it up and stick it in your box, well that's kind of like these dogs are that this man was using on this particular day. They've got big round rings on it, you know, where you pick them up. And it is designed for one man to hold one side of it and another man to hold another side. And we expect the evidence to show that the best procedure, the orderly way to do it and the way it's supposed to be done is with four men with two man dogs pulling on that cross tie to move it.

We expect the evidence to show at this time that Charlie Frank Thornton was having to do it by himself. The straw boss had gone down to the main line and left him

* * *

[72] Thronton - cross

of evidence.

MR. Dicus: Well, I will stay away from it.

END BENCH CONFERENCE.

Q MR. DICUS: Mr. Thornton, what do you say that the railroad did to cause your injury?

A Well, I would say that I had a lack of help that day. I didn't have no help in order to - maybe if a couple of more men or three more men had been there that day I possible wouldn't - I can't say definitely, but I say possibly I wouldn't have been injured today.

Q You possibly wouldn't have been injured if you had help. Is that your statement?

A The proper help.

Q The proper help. Is that what you said?

A Yes.

Q You are saying then they just worked you too hard, gave you too much to do?

A Well, I just know that I didn't have any help that particular day, the day that I was injured.

MR. DICUS: I have nothing further.

THE COURT: Any other questions?

* * *

[80] Wilkinson - Cross

Q And Charlie did as you instructed him and he began to unload the cross ties. Is that correct?

A That's correct.

Q And he was to pull after he unloaded them it was up

to him then because you had to take - you all were working a short crew and you had to take the tools down the track and he had to pull those ties up on the railroad where you all could get them up. Is that right?

A Well, he did do it, yes.

Q But that would be his job while you were toting the tools down the track, wouldn't it?

A Well, for him to do something until I get back.

Q All right. Let me ask you something. You've been working out at the railroad for quite a while. Would you say that it would take at least four men to safely handle one of those cross ties?

A Normally, yes, if one was heavy.

Q The railroad only provided two of you all on this particular day to do this work. Isn't that right?

A That's right.

Q Now have you ever known before this date, had you ever known Charlie Thornton to have any trouble with

* * *

[90] Wilkinson - direct

MR. MOORE: If I am following your statement there, Your Honor, I believe if he has a written statement that he could show or some oral recording that he could show a previous inconsistent statement then he could impeach him.

THE COURT: Sure, either side can do that.

MR. DICUS: Would not the same rule apply if he merely said it in the presence of other witnesses who are present to testify?

THE COURT: Well, I don't know. Do you want to ask him a question about something and then ask him if he on another occasion said something different? You haven't done that yet.

MR. Dicus: All right, sir.

Q MR. DICUS: Did you testify, well, you did testify a while ago that Mr. Thornton was all by himself when he got hurt. Is that what you testified?

A That's right.

Q Did you tell me in the presence of other people anything different last Wednesday afternoon in Opelika?

A I said last Wednesday in Opelika that we was handling a cross tie together trying to put it in and that he slipped. His feet was in the bushes. He was [91] holding the tie up with his hand and that I had the tie dog and that when I got ready to pull the tie that he slipped and he said that he believed that his back is hurt.

Q Are you saying that it's better for three or four men to get around a cross tie and lift it than just two men? Like they are doing in this picture?

A That's right.

Q Well, I am sure you are correct but let me ask you this. I can lift this and I can lift this. Which do you suppose is

the easiest for me to lift?

A Probably the paper because it's lighter.

Q But I can lift both of them without much trouble can't I?

A That's right.

MR. DICUS: That's all.

THE COURT: Anything else?

MR. MOORE: No, Your Honor.

THE COURT: You may go down.

Call your next witness.

* * *

[98] Campbell - cross

down here. On the section crews you don't have a machine to put a tie in and take the other tie out when you don't have a machine?

A No sir.

Q How is that done? By cleaning out the gravel and then pulling out the spikes and two men on one side and two on the other side trying to get it out of there?

A Right.

Q Let me ask you to look at this picture here. This shows, Plaintiff's Exhibit No. 4, that shows four men pulling

on two two man dogs, doesn't it?

A Right.

Q Those four men are pulling a tie up here I believe where they are putting that track, right?

A Right.

Q See the track back here and the ties back here.

A Right.

Q And the rail sits on top of this.

A Right.

Q In your opinion these cross ties, does it take this many men, four men, to safely pull one of these cross ties up and put it on a road bed?

A It would be safe.

* * *

[100] Campbell - cross

would be working when I worked with them.

Q He was there?

A Right.

Q These weeds along the railroad track were permitted to get kind of high. They don't come along and spray them much anymore, do they?

A Right.

Q And whenever you are walking in those weeds it's sometimes hard to keep your footing, is it not?

A Right.

MR. MOORE: That's all I have.

THE COURT: Anything, Mr. Dicus?

MR. DICUS: No sir.

THE COURT: You may go down. Call your next witness.

ATT SCOTT

Witness called by the Plaintiff first being duly sworn by the Clerk, testified on

CROSS EXAMINATION

BY MR. MOORE:

Q Mr. Scott, would you state your name for the Court and Jury, please?

A Att Scott.

Q And that's A-t-t Scott, correct?

* * *

[140] Dr. Serrato - direct

Not all ruptured discs have to be operated on. A ruptured

disc does not need to be operated on just because it ruptures. A ruptured disc has to be operated on when the suppressed nerve starts to involve to the point that the patient becomes handicapped. That is when you have a justification for surgery. And definitely we were in that stage in this case after that length of time.

Q I want to ask you this, Doctor. I want you to assume that on November 26, 1976, that Charlie Thornton was employed as a laborer with the railroad company, and I want you to assume further that he was required to pull a cross tie similar to this shown in Plaintiff's Exhibit No. 4 by himself, and assume further that in pulling this cross tie, assume that that cross tie weighed in excess of 150 pounds. Assume that in the process of this his foot slipped some, just a little - foot slipped. That he immediately felt a catch in his back. Could such an event as I just outlined to you be a competent producing cause of the ruptured dics that you found and that you described to this jury today?

A The answer is in the affirmative, Mr. Moore. It was the competent cause that would create the mechanics which would produce an injury to the ligament of the disc which eventually, in due time, and with the added stress of the job would evolve into the set of circumstances that we just described to the jury in the last two minutes.

* * *

[145] Dr. Serrato - direct

Change your anatomy. You don't have the same person anymore. Now the disc itself, you say what damage is done to the patient by taking his disc out? Really, there's no

damage at all. You can take the disc out, throw it away, and there's no problem. Your problem comes related to the scar tissue which you are going to create by the instrumentation, the use of the tools that we have to put into the spine, the touching of those nerves which you have to maneuver and manipulate to get them out of the way so as not to damage them, so as not to injure them. So you create a new set of circumstances which is more favorable to the patient than what they had before. So as a result of that you've got a permanent change which can be translated in two fashions. A physiological change, the ability to function, and an anatomical change which is actual changes that have been created by virtue of the knife and by virtue of the injury itself. So you've got a combination of both. In this patient you do have a permanent disability, anatomical and physiological, and we have established a rating of disability in this type cases which runs anywhere in the vicinity of approximately 10 percent. Now this translates to the fact that this patient will have to be more careful, they have to be more cautious, they have to be restrained as to specific type of activities because we know that these patients are more susceptible to create more problems if we expose them to the same type of [146] injury and the same type of stress. So we restrain him as much as we can from that type of activity.

Q How much disability did you say he had?

A I think we gave this man a combined disability of about 15 percent, which 5 percent was based on psychological factors which developed as a result of this problem, and also 10 percent related to the anatomical and physiological changes of his lumbosacral spine.

Q In your opinion should this man return to laborer type work? I'm talking about pulling on cross ties of 150 pounds, lay rails, what-not-return to this type work?

A I wouldn't, Mr. Moore. I would be hesitant because yes, he can do it - he can do it for a while. The question is how long is the man going to be subject to stress before he is going to get some real progressive scar tissue formation, instability, obstruction, a new set of rules and new problems which is going to be more difficult to correct. So it's much simpler just to tell these people yes, you can work, but we are going to restrain your activities as much as we can as far as stress type work and then see how it develops the following two, three, four or five years. I keep these people out of work for one year. My policy for the last thirty years that I've been doing spine surgery is that all railroad cases, that is people who do manual labor and this type work, which is heavy

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[153] Dr. Serrato - cross

It doesn't mean a thing - your appointments are not related to your being or not being certified. Your appointments are related to your having had the proper training. And I have unquestionably received the proper training as far as orthopedic surgery is concerned.

Q Do you know any orthopedic surgeon that you can name to us in the City of Columbus who is not a member of this organization other than yourself?

A As far as I know I think that most of them are. I don't know if there's any one of the new men in town that have not taken the examinations yet.

Q You did not tell us how much your bill was for treating Charlie Frank Thornton. I presume Mr. Moore will get back to that sooner or later. Do you have an itemized bill, Dr. Serrato?

A I have a copy of the itemized bill for the services provided to this patient over the length of time, two years, which stands at the present time at $3,312.25.

Q All right. $3,312.25. May we go over that briefly?

A All right, sir.

Q Laminectomy, that was the operation you performed when you removed this man's disc, isn't it?

A That is correct.

Q The price for that is $800?

A It was $800 then. It's $1,000 now, by the way.

* * *

[168] Dr. Serrato - cross

destroyed. That automatically changes the pattern of your structure, your annulus fibrosis and that's when you start the extrusion, the actual extrusion of the disc.

Q And you say the fluid will extrude?

A Has to.

Q Do you mean a gelatinous substance, or like water? We are talking about something like Jello, aren't we?

A Well, It's not quite solid. It's an in between liquid and jelly-like.

Q Now somewhere along in there you decided this man had mental problems and you referred him to your

pain clinic across the hall?

A He didn't have mental problems. He had psychological variation as he relates to the stress or the problem that he had, and that is when we need the psychologist to come in and tell us what the problem is and what can be done to correct the same. This is what you call a chronic pain problem.

Q And you said in this deposition that this treatment from the pain clinic helped him tremendously. Did you know, as a matter of fact, that he only went there twice, Dr. Serrato?

A That's all it took to get him over it.

Q Did you know as a matter of fact that he broke about another half a dozen appointments that they tried to [169] get him to keep and he wouldn't keep?

A That was his problem, you know. We had set up for him a program to get him back normally. Two visits were sufficient for this man to get reorganized.

Q Did you know that the last time he saw him was the morning that I took the psychologist's deposition, and did you know that he had not seen this man for a year and a half up to that time?

A All right.

Q Did you know that your psychologist on that date, January 31 of this year, - and of course this is your corporation - and in effect these are your business records, are they not?

A That is correct.

Q Pain rehabilitation center. Now I will ask you do you know where he says, Mr. Thornton began our interview in a very passive, aggressive, hostile dependence. Now isn't that about two things diametrically opposite?

A I cannot tell you those things, Mr. Dicus. I don't know about it. That's not my field.

Q Then do your records not show when he says, - -

MR. MOORE: I rise to object to matters that he is referring to outside the record of this trial. These matters are wholly outside the record.

THE COURT: Do you want to eliminate it from [170] your $3,312 bill?

MR. MOORE: Yes, sir, we will do that. We are not fussing over $300 and whatever dollars it is. We have already eliminated it. There's no need in fussing over that.

MR. DICUS: Your Honor, that's already being claimed and we are trying to show the jury just what - -

MR. MOORE: Rather than go on and on with this we will just withdraw this whole deal, Your Honor.

THE COURT: Of course the man, I gather, claims psychological injury.

MR. MOORE: The only thing we claim as Psychological injury is the matter of the pain and suffering.

MR. DICUS: If he wanted to withdraw all claims for any psychological mental and emotional injury, then maybe I ought not go into it, but - -

THE COURT: You can until he does.

MR. MOORE: I understand, Your Honor - I'm not objecting to him going into it, but these statements that he is reading which are out beyond the record - unless the doctor made them, or there's something in the record, he shouldn't go into those things.

THE COURT: I think he can ask the doctor about them. They are made by the doctor's pain clinic. He operates it, this is his employee, and he is responsible [171] for it and he may be asked about it.

MR, MOORE: I thought it was a corporation - -

THE COURT: No sir, he has already testified he owns it, lock, stock and barrel. Go ahead.

MR. DICUS: Thank you, Your Honor.

Q MR. DICUS: Some of his comments were such as "I don't know why I had to wait out there with all those white folks coming before me." "Getting no help from anybody." "Nobody can handle my problem." Were you aware of these statements being made and being put into your corporation record, Doctor?

A No, because that's the pain clinic, and the people that run the pain clinic are qualified, licensed, clinical psychologists, and this is their area, they handle these problems. If I need to know specifically some advice from them in dealing with my part of the problem, orthopedically, I call them and ask them, If I have no problems from my area from the standpoint of the spine there's just no need for me to consult with this patient at all. It is their problem. They have to handle it with the clinical psychologist.

Q Did you know Dr. Haddle said, "It is my opinion that he has developed a depressive neurosis which was triggered off by the accident, but it should be noted that any stressful situation could have triggered this problem off, particularly one of a long-standing difficulty such as [172] his." Did they discuss these facets of the man's medical treatment with you, or did you just say they don't usually do that unless it's something unusual?

A Well, if I need to know something about any pattern which affects my phase of the work that I have to do with this patient from the orthopedic standpoint I will discuss that with them. If I don't see any benefit to me - this is a problem that has to be solved by the pain clinic and the clinical psychologists. I don't get involved with that, Mr. Dicus, at all.

Q All right. Now you diagnosed a permanent disability of 15 percent. Would you say that is to the body as a whole?

A That is correct.

Q And you wrote that down, 10 percent clinical or anatomical, and 5 percent mental?

A That is correct.

Q In view of what you just heard do you really think he had this 5 percent? Are you attributing a whole one-third of this permanent disability to mental consideration?

A I think so. I think this man is a different person now, Mr. Dicus. He is not the same person that he was before, when I started to work with him. After two years I have observed this man, I have talked to him, I have, you know, dialogue with him continuously about his

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[54] THE COURT: All right, let's talk about these Interrogatories. If we are going to use them, you gentlemen have to substitute a copy where the answers are not underlined. You have emphasized question No. 18 with a pen. The original must be in the Court's file and that can come out. Madam Clerk, would you substitute out of that file whatever is filed with the Court which has no pen and ink mark on its, please. Gentlemen, that is what we would normally require.

MR. DICUS: Of course, I don't realize I had underlined.

THE COURT: Now, on your requests to charge. Rather than use the respective versions of this, it seems to the Court, just to be fair and square on both sides, just to take the Devitt and Blackmar charge and use it rather than what you each have requested. That covers everything that you both have asked except for one question and that is income taxation. Now, the only monetary evidence we have heard is loss of gross wages so far. The Supreme Court of the United States on February 19 of 1980, in the case of *Norfolk & Western Railway Company vs. Liepelt*, 48 Law Week, page 4132, held it was error for the trial court not to tell the

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[57] seems like it is a legitimate inquiry. I will leave that up to you, but anyway, I would intend to tell the jury that their award would not be subject to income taxes. He won't have to pay any taxes. Other than that, I am going to follow, generally, Devitt and Blackmar in its entirety. Now, I would assume, gentlemen, that the Railroad intends to argue that if the man was injured it was his own fault, he was negligent.

MR. DICUS: Yes sir.

THE COURT: That's the reason I framed those Interrogatories the way I did. It seems to me like it's an obvious argument in the case.

How long do y'all want to argue now? Bejond that, do you see any necessity for me to go over every one of these requests y'all have made? If you want me to, I will do it. Well, let's do it right quick.

On the Plaintiff's side, request No. 1 is covered by what I will give. Request No. 2, assumption of risk, I think out of fairness ought to be explained and will be covered.

Request No. 3, proximate is not appropriate, Proximate causation is not the test as I read the FELA.

* * *

[121] education and experience, or if you should conclude the reasons given in support of an expert's opinion are not sound, or that the opinion is outweighed by other evidence, you may disregard the expert opinion entirely.

Now as explained to you during the trial certain testimony was read to you by way of deposition. Such testimony is taken pursuant to the rules and is entitled to the same consideration and is to be judged as to credibility and weighing and otherwise considered by you insofar as possible in the same way as if the witness had been present and had testified from the witness stand.

Now let me tell you about the basis for this lawsuit and explain to you the terminology and everything that you have to consider concerning the plaintiff's proof of this case. This lawsuit, ladies and gentlemen, is based upon a

law that was passed by Congress. It says, every common carrier by railroad, while engaging in commerce between any of several states shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce for such injury resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier.

Let me go over that one more time. Every common carrier by railroad while engaging in commerce between any of the several states shall be liable in damages to any [122] person suffering injury while he is employed by such carrier in such commerce for such injury resulting in whole or in part from the negligence of any of the officer, agents, or employees of such carrier.

Now there's no dispute over the fact that this particular railroad is a common carrier by railroad, that it was engaging in commerce. You don't have to worry about that. That's not an issue for you to have to decide.

Now let's look at the part then that is important. First of all it says, to any person suffering injury while he is employed. Now it's admitted in this case that during the period of time plaintiff was employed by this railroad. That's not an issue for you to decide. The lawyers have eliminated that because they agree to it, that he was an employee. Now they do dispute that whatever injury he may have sustained was suffered by him during the period of time. That is a dispute.

It goes on to say for what injury is the railroad liable? For such injury resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier. So that's saying that the railroad is not liable for everything that happens to an employee. It's only liable if if happens in whole or in part from the negligence of officers,

agents, or employees of the railroad. That's where we get the basis for the

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[138] Mr. Marshal, would you take the jury to the jury room?

JURY LEAVES COURTROOM: *2:47 P.M., February 26, 1980.*

EXCEPTIONS TO COURT'S CHARGE

THE COURT: Any exceptions or additions for the plaintiff?

MR. MOORE: Your Honor, the only one that we have, only two, one which I think was just a mistake that the Court made, and that was where the Court charged them that he was one of several. He was only one of two.

THE COURT: What does the word several mean? More than one. doesn't it?

MR. MOORE: I think it means more than two. And the second one was the Court did not go ahead and charge the second part of the statute - in any acts of negligence of agents, servants, employees, the insufficiency in its tracks, road beds, box cars, etc. We think in this case in the evidence it was adduced, the Court remembers it was brought out that the weeds were high out there, and this could have caused the footing to be bad. We think the Court should have given that.

Otherwise we have no exceptions.